IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NOS. 7 AND 8 OF 2006

CRIMINAL APPEAL NO. 7 OF 2006

Ramanand Pandey,
s/o Badrinath, H.No.160,
Noronha House, Vidya
Nagar, Borda, Margao,
Gooa(Presently in custody
at Central Jail Aguada). ... Appellant

versus

State, through the Public
Prosecutor. ... Respondent

Mr. P. P. Singh, Advocate for the Appellant.

Ms. Winnie Coutinho, Public Prosecutor for the Respondent.

CRIMINAL APPEAL NO. 8 OF 2006

Rajesh Chaubey,
s/o Sudhakar, age 35 years,
H. No. 535, Davorlim Housing
Board, Davorlim, Salcete, Goa
(Presently in custody at Central
Jail Aguada). ... Appellant

versus

State, through the Public
Prosecutor. ... Respondent

Mr. S. G. Bhobe, Advocate for the Appellant.

Ms. Winnie Coutinho, Public Prosecutor for the Respondent.

CORAM : S. A. BOBDE &
N. A. BRITTO, JJ.

DATE : 27TH JUNE, 2007.

J U D G M E N T(Per N. A. BRITTO, J.)

These appeals are filed by the accused who have been convicted and sentenced for life imprisonment under Section 302/34 I.P.C. and to pay a fine of Rs.5000/- each, in default to undergo imprisonment for six months, by Judgment dated 26/28-11-2005 of the learned Additional Sessions Judge, Margao in Sessions Case No. 18 of 2004.

2. There is no dispute that A-2/Rajesh is the brother-in-law of A-1/Ramanand and the latter was the proprietor of Vidya Marketing Agency situated at Anand Bhavan Building, Station Road, Margao. This building has ground and three floors. The deceased Raj Kumar Soni, aged 23 was an ex-employee of A-1/Ramanand and his dead body was found in the office of the said Vidya Marketing Agency which is situated on the second floor of the said building where there were no other offices except one which was closed. On the ground floor there was Shahi Darbar Hotel run by PW18/Mohammad Bawa and on the third floor there were no offices or shops but only a godown. On the first floor, there were some offices. The staircase to go on the upper floors was a

separate staircase, but adjacent to the said hotel.

3. The accused were charged and tried with the allegation that on 17-3-2004 at about 18.30 hours at the said agency office of A-1/Ramanand both the accused in furtherance of their common intention assaulted the deceased Raj Kumar Soni and A-1/Ramanand stabbed the deceased with a knife(M.O.18) thereby causing his instantaneous death, the motive being a dispute over money transaction.

4. Although the prosecution had cited an eye witness the person of PW6/Manoj whose statement they had got recorded under Section 164 of the Code of Criminal Procedure, 1973(Code, for short) in the presence of Special Judicial Magistrate PW12/Shri Faria, the said Manoj Kumar resiled from the statements earlier given by him both under Section 161 as well as Section 164 of the said Code and as a result he was cross-examined by the prosecution. The said PW6/Manoj Kumar was an ex-employee of the said agency of A-1/Ramanand and the prosecution has not been able to derive any benefit from the said cross-examination. Therefore, the evidence of PW6/Manoj Kumar Pandey has been of no use to the case of the prosecution and as rightly observed by the learned trial Court a statement recorded of a witness under Section 164 of the Code could have been used only for the purpose of contradiction or corroboration and for no other purpose. The learned trial Court in this context relied upon the case of **Ram Kishan Singh** v. **Harmit Kaur and another**(AIR 1972 SC 468) wherein the Apex Court has reiterated the principle

that a statement under Section 164 of the Code is not a substantive evidence and it can be used only to corroborate or to contradict the witness.

5. The case of the prosecution thereafter rested on circumstantial evidence.

6. The case of the prosecution was unfolded, first by PW18/Mohammad Bawa and next by PW1/PSI Prabhudessai. As per PW18/Mohammad Bawa both the accused had their business of sales at Vidya Marketing Agency much before he took over the hotel business. According to him, on 17-3-2004 at about 7.00 p.m., A-1/Ramanand came and told him that some person came to attack him and he made a phone call to the Police and at that time both the accused were present and he noticed that there were bleeding injuries on the hand of A-2/Rajesh and A-1/Ramanand appeared to be nervous and although there were no injuries on his body there were blood stains on his shirt and thereafter the Police Officer came and A-1/Ramanand went along with him but he did not know where A-2/Rajesh went. In cross-examination, he stated that his relationship with A-1/Ramanand was only that of a neighbour and nothing beyond that.

7. As per PW1/ Shri Prabhudessai, he was attached to Margao Police Station and was a Duty Officer on 17-3-2004 from 13.00 hours. According to him at about 7.15 p.m. Havaldar Talekar informed him that he had received information from the Police Control Room, Margao, that one person had

stabbed himself near Shahi Darbar and upon receipt of the said information, he immediately rushed to the spot and made inquiries with the staff of Shahi Darbar restaurant where he came to know that a fight had taken place in the office of Vidya Marketing Agency situated on the second floor. He further stated that it was revealed that one person was lying in the said office and another injured was shifted to hospital. He also stated that while inquiring one person wearing yellow shirt with blood stains informed him that he had requested the staff of Shahi Darbar to inform about the incident to the Police and the said person gave his name and address as Ramanand Pandey, native of Uttar Pradesh and proprietor of the said Vidya Marketing Agency at Margao and further informed him that one Raj Kumar Soni who was his ex-employee had come to his office at about 6.30 p.m. asking for money and he had arguments with him and also informed him that during heated arguments with him and his brother-in-law A-2/Rajesh they had a scuffle and during the said scuffle the said A-2/Rajesh was injured and the said Raj Kumar Soni was lying in the office. As per him, A-1/Ramanand also informed him that he had sent A-2/Rajesh to the hospital in his Maruti van along with one Mobin who drove the said Maruti van. As far as the aforesaid part of the statement of PW1/PSI Prabhudessai is concerned, it need be observed that the information that a person had stabbed himself was presumably first given by A-1/Ramanand to PW18/Mohammad Bawa and who had conveyed the same to PCR(Police Control Room), Margao and in turn the same was conveyed to PW1/PSI Prabhudessai. The story of a fight having taken place in the Vidya Marketing Agency or that a person was lying in the said office and the other was shifted to the hospital presumably came

from no other than A-1/Ramanand himself. The learned Sessions Judge has held the said information given by A-1/Ramanand to be inadmissible, as being hit by Section 25 of the Evidence Act, at the same time holding that when the said information was given the investigations had not started. What Section 25 of the Evidence Act prohibits being proved is a confession made to a Police Officer by a person accused of an offence. The word "confession" has not been defined under the Evidence Act, 1872 but an admission has been defined under Section 17 of the said Act, as a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under circumstances mentioned therein. Although, a confession will include an admission and in turn an admission a statement, the reverse is not necessarily true. A statement in order to amount to a confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence as stated by Lord Atkin in Privy Council decision in the case of **Pakala Narayana Swami** v. **Emperor**(AIR 1939 P.C. 47) and followed in **Veera Ibrahim** v. **The State of Maharashtra**(AIR 1976 SC 1167). This Court in **Satyawan Pagi** v. **Union of India and another**(2006 (1) Bom. C. R. (Cri.) 529) held that "if a person admits facts necessary to convict him, it is a confession and if such admission does not give all essential elements of crimes, it is only an admission and not a confession. Confession in other words, is a direct admission or acknowledgment of the guilt by a person who had committed a crime. As per Stephen in his Digest of the Law of Evidence, a "confession" is defined as an admission made at any time by a person charged with a crime stating or suggesting the inference

that he has committed the crime. In order to distinguish a confession from an admission, a simple test is applied and if a statement by itself is sufficient to prove the guilt of the maker, it is a confession but if the statement falls short of it, it amounts to an admission. Admittedly, PW1/PSI Prabhudessai had reached the scene to verify the information received that a person had stabbed himself. There was no accusation made against A-1/Ramanand when PW1/PSI Prabhudessai reached the place nor any first information report was lodged inasmuch as no investigations in any cognizable case had started. In our view, therefore, the said statements by A-1/Ramanand to PW1/PSI Prabhudessai and later on recorded by him in his FIR could not have been said to have been inadmissible. The said statements were relevant both under Sections 8 and 21 of the Evidence Act. In this context, ready reference could be made to a three Judge decision of the Apex Court in **Agnunmagesia** v. **State of Bihar***(A*IR 1966 SC 119) wherein the Apex Court observed that where the accused gives the first information, the fact of giving his evidence is admissible against him as under Section 8 of the Evidence Act. If the information is non confessional, it is admissible against the accused as an admission under Section 21 of the Evidence Act and is relevant. Reference could also be made to **Bheru Singh** v. **State of Rajasthan**((1994) 2 SCC 467) wherein the Apex Court held that where the accused himself lodges the FIR, the fact of his giving the information to the Police is admissible against him as evidence of his conduct under Section 8 of the Evidence Act and to the extent it is non confessional in nature, it would also be relevant under Section 21 of the Evidence Act but the confessional part of the FIR by the accused to the Police Officer could not be used at all against him in

view of the ban of Section 25 of the Evidence Act. Suffice it to observe that the statements made by A-1/Ramanand to PW1/PSI Prabhudessai were not confessional in nature but being admissions of relevant facts were admissible in evidence.

8. Reverting to the version of PW1/PSI Prabhudessai, he further stated that he along with A-1/Ramanand proceeded to the said office in Room No. S-5, first floor of the said building and while proceeding towards the said office he found blood stains on the staircase as well as in the passage upto the said office and then A-1/Ramanand opened the door of the office and one male person was lying on the floor in a pool of blood and he checked his pulse and found that he was dead. He stated that there were blood stains on the walls of the said office as well as on the table and he noticed a stab injury on the left side at the back and blood oozing out from it. He also noticed that there was a knife with black handle which was lying on the table top with blood stains. He stated that from the observations of the scene and the inquiries made by him he concluded that it was a case of homicide and therefore he lodged a complaint against both the accused for committing the murder of the deceased. PW1/PSI Prabhudessai stated that his complaint was recorded by PW19/P.I. Shirwaikar at the scene of offence and he was instructed to guard the scene of offence and thereafter PW19/P.I. Shirwaikar went back to the Police Station to register the complaint and thereafter returned and conducted the scene of offence panchanama.

9. PW19/PSI Shirwaikar has confirmed that he had received a phone call from PW1/PSI Prabhudessai stating that a dead body of a male person was lying in a pool of blood in Vidya Marketing Agency and a knife was seen on the spot whereupon he proceeded to the spot and thereafter recorded the complaint of the said PW1/PSI Prabhudessai. He also stated that PW1/PSI Prabhudessai had come to the conclusion that the injury on the deceased was not self inflicted and it was a case of homicide. As per him, the scene of offence panchanama was conducted in the presence of PW17/Gaus Mohidin and PW2/Makbul Ahamed. These two witnesses have not supported the said panchanama. Nevertheless what was seen at the scene has been sufficiently established by the prosecution through the evidence of PW1/PSI Prabhudessai, PW19/Shirwaikar, the photographer PW20/Shri Sakhalkar who produced 32 photographs along with the negatives besides two other Police Officials who had gone along with PW19/P.I. Shirwaikar, namely, PW21/Ramesh and PW22/Sameer.

10. On behalf of A-1/Ramanand, Mr. P. P. Singh, the learned Counsel has submitted that the independent witnesses having not supported the panchanama, the panchanama could not be said to have been proved and therefore the fact that the dead body of the deceased was found in the office of A-1/Ramanand could not be accepted. We are unable to accept this submission. PW1/PSI Prabhudessai was the first one to reach the scene of offence along with A-1/Ramanand himself when he found the dead body of the deceased and the knife on the table. Only because he is a Police Officer it does

not mean that his evidence should be discarded. In this context, we may refer to the decision of the Apex Court in **Karamjit Singh** v. **State(Delhi Administration)**(2003 Cri. L. J. 2021) wherein the Apex Court has held that the testimony of police personnel should be treated in the same manner as the testimony of any other witness and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies as much in favour of police personnel as of other persons and it is not proper judicial approach to distrust and suspect them without good grounds. In the case of **P. P. Fatima** v. **State of Kerala**((2003) 8 SCC 726) it was contended that since the panch witness to the seizure panchanama had not supported the prosecution case, the seizure could not be accepted and the Supreme Court held that mere fact that a panch witness does not support the prosecution case by itself would not make the prosecution case any less acceptable, if otherwise the Court is satisfied from the material on record and from the evidence of the seizing authority that such seizure was genuinely made. In our view, there is nothing to doubt the evidence of PW1/PSI Prabhudessai or for that matter PW19/P.I. Shirwaikar or the other Police Officers and the photographer. The said evidence clearly shows that the dead body with the injury at the back was found in the office of A-1/Ramanand and a knife with blood was found on the table top. The manner in which the said knife was handled or was allowed to be handled by PW19/P.I. Shirwaikar leaves much to be desired. PW19/P.I. Shirwaikar ought to have seized and sealed the said knife at the scene itself and in case it was allowed to be taken by the finger print expert then it was necessary for the prosecution to have examined the said

expert to find out as to what he had done with the knife taken by him. The mere fact that subsequently the knife, M.O.18 was found to have blood stains, when examined in the CFSL, Hyderabad, can be no consolation to the prosecution. One does not know what happened to the said knife from the time it was taken by the finger print expert and till it was sent to the CFSL, Hyderabad. However, the fact remains that PW1/PSI Prabhudessai and others saw it with blood stains, on the table, which clearly suggests that it was used in the commission of the offence.

11. The inquest panchanama of the deceased was done in the presence of PW4/Ramdas Hazare. The body of the deceased was identified by the wife of the deceased PW11/Kavita and the clothes worn by the deceased, namely, a black colour T shirt soaked with blood and a cut mark/Exh.14-(a), a jean pant/Exh.14-(b) and an underwear of blue colour/Exh.14-(c) were attached by the Investigation Officer and the said attachment has been sufficiently proved by the evidence of the said PW4/Hazare. The dead body of the deceased was sent for post mortem examination and the same was conducted on the next day by PW13/Dr. Banaulikar and who found that the deceased was having a stab wound of 3.5x1.5 cms. which had penetrated into the left pleural cavity penetrating the left lower lobe to a length of 4 cms, cutting the chest wall to a length of 3 cms. which was directed forward, medially and upward. PW13/Dr. Banaulikar also found that there was a bruise on the left eye brow, a laceration on the left temporo frontal scalp and an abrasion over the left side of the neck, details of which he has given in his evidence as well as in his autopsy

report/Exh.68. According to him, the injury found on the deceased could have been caused by the knife/M.O.18. As per his opinion, the deceased died due haemorrhagic shock as a result of the first injury which according to him was caused by a sharp and penetrating weapon and which was necessarily fatal at the time of death. In cross-examination, he stated that one blow with the kitchen knife/M.O.18 was sufficient to cause the said first injury. The evidence of PW13/Dr. Banaulikar sufficiently proves that the death of the deceased was homicidal.

12. If PW18/Mohammad Bawa saw A-2/Rajesh with a bleeding injury on his hand, it is A-1/Ramanand who told PW1/PSI Prabhudessai that he was sent to the hospital in a Maruti van along with driver Mobin who was not examined as he was found not traceable. A-2/Rajesh was examined by PW16/Dr. Araujo in Dr. Carmo Gracias Nursing Home on 17-3-2004 at about 7.50 p.m. and as per Certificate/Exh.80 with history of a cut with a knife. According to PW16/Dr. Araujo, A-2/Rajesh had a clean cut wound over distal and right index finger and rupture of the extensor tendon and a contused lacerated wound in the web space of the thumb. As stated by him, A-2/Rajesh was discharged on 18-3-2004 after he was operated for the repair of tendon. According to PW16/Dr. Araujo, A-2/Rajesh had informed him that there was a fight due to which he had sustained the said injury and since he was bleeding profusely he had admitted him. A-2/Rajesh in his examination under Section 313 Cr. P. C. stated that the said injury was received by him due to the glass of window. The learned trial Court observed that there was no broken glass found

at the scene and therefore he could not have sustained such an injury. Both the accused were examined by PW13/Dr. Banaulikar on 19-3-2004 and PW13/Dr. Banaulikar had found no injuries on the person of A-1/Ramanand but found that A-2/Rajesh was having a sutured incised wound, of U shape over the ventral aspect of right index finger with vertical arms of 1 cm. each and horizontal arm of 1.7 cms. situated over the skin of second phalynx palmar aspect. In his opinion, the injury was defensive and was caused with a sharp edge of a weapon. PW13/Dr. Banaulikar further stated that upon inquiry with A-2/Rajesh as to the cause of the said two injuries, he told him that he was the brother-in-law of A-1/Ramanand who was a businessman and an employer of the victim Raj Kumar Soni and that on 17-3-2004 at 7.00 p.m. there was a quarrel between A-1/Ramanand and the victim Raj Kumar Soni in his presence on the issue of money transaction and that resulted in an attempt by the victim, Raj Kumar Soni to assault A-1/Ramanand with a sharp knife and since he(Rajesh) intervened to prevent the attack(A-2) got cut on his right hand while removing the knife from the victim Raj Kumar Soni's hand. He also stated that A-2/Rajesh removed the knife and threw it aside. The admission made by A-2/Rajesh to both the Medical Officers who examined him, namely, PW16/Dr. Araujo and PW13/Dr. Banaulikar clearly proves that he had sustained the said injury in a scuffle with a knife and therefore the plea put forward by him that he had sustained it with a broken window glass had necessarily to be considered as a false plea which could be taken as an additional circumstance against him. As far as an admission by an accused to a medical officer is concerned, the law is well settled, that the same are admissible in evidence when made in connection

with explaining the injuries found on the accused. (See **State of Kerala** v. **Anmini**(AIR 1978 SC 260) followed in **Prakash Parab** v. **State**(2006(1) AIR Bom. R. 775).

13. If PW18/Bawa saw A-1/Ramanand with a shirt with blood stains, the said shirt was attached by PW19/P.I. Shirwaikar under arrest panchanama Exh.37 at 00.30 hours on 18-3-2004 and although PW3/Vital stated that he had not seen any stains on the said yellow colour shirt/M.O.12-(a) he clearly identified the said shirt as the shirt which accused no.1 was wearing on that day. The evidence of PW3/Vital when considered in the light of the evidence of the Investigation Officer is more than sufficient to conclude that A-1/Ramanand soon after the incident was found with a yellow colour shirt on which PW18/Bawa had seen blood stains and which blood stains were subsequently confirmed by CFSL report Exh.104 to be of human blood but its group could not be detected due to disintegration of blood group specific substances. Evidently, A-1/Ramanand had no injury on him and gave no explanation as to how his shirt/Exh.12-(a) was found with human blood which could have been either of the deceased or that of A-2/Rajesh both of whom had bleeding injuries and which would show his involvement with the death of the deceased. The learned trial Court has also noted that another circumstance which connects A-2/Rajesh with the death of the deceased is that the prosecution had proved the blood group of A-2/Rajesh as O Rh and blood of group O was detected on the clothes of the deceased, namely, Exh.14(a), 14(b) including the underwear (Exh.14(c)). It may be noted here that the blood group of the deceased was B Rh positive but

the blood of this group was not found on the very shirt of the deceased namely Exh.14(a) which was otherwise stated to have been soaked with blood. Similarly, the blood group of A-2/Rajesh which was O Rh positive could also not be detected on the very shirt of A-2/Rajesh i. e. Exh.17(a) or on Exhs. 10 or 11 being the cotton pieces on which blood was collected from the corridor and which blood could have been only that of A-2/Rajesh who had come out from the office with the said bleeding injury on his hand. We are unable to understand and the prosecution has not given any plausible explanation, as to how the blood of the group of A-2/Rajesh namely O could ever be detected and that too on the underwear of the deceased (Exh.14(c)). In our view, the presence of the blood of O group of A-2/Rajesh cannot be logically explained by the prosecution in the face of the fact that the group of the deceased's own blood could not be detected on the clothes worn by him namely Exhs.14(a), 14(b) and 14(c) and to that extent we are unable to rely on this circumstance to connect A-2/Rajesh with the murder of the deceased.

14. The circumstantial evidence proved by the prosecution shows that the deceased was found in Vidya Marketing Agency belonging to A-1/Ramanand and besides the dead body there was also a knife with blood stains found on the table. The prosecution has proved through the evidence of PW13/Dr. Banaulikar and the report of CFSL, Hyderabad and the latter confirms that the cut on the shirt of the deceased could be caused by the said knife, that the said knife was used in inflicting the injury on the deceased. The place where the said injury was inflicted shows that it could not be inflicted only by one accused without an

overt or covert act from the other. The presence of human blood on the yellow colour shirt/Exh.12(a) of A-1/Ramanand further confirms his involvement in the death of the deceased. Obviously, A-1/Ramanand had no injury. The presence and involvement of A-2/Rajesh is established from the injury on his right hand as well as by human blood on his shirt/Exh.17(a) and also in the passage which blood could be of none other than of A-2/Rajesh. The admission made by A-1/Ramanand to PW1/PSI Prabhudessai that there was a scuffle with the deceased in the course of heated arguments further proves the involvement of both the accused. Likewise, the admission made by A-2/Rajesh to PW16/Dr. Araujo as well as to PW13/Dr. Banaulikar proves their involvement in the death of the deceased.

15. As far as the circumstantial evidence is concerned, the view of the Supreme Court has been consistent throughout from the case of **Hanumant Govind Nargundkar and another** v. **State of Madhya Pradesh**(AIR 1952 SC 343) to **Sharad Birdhichand Sarda** v. **State of Maharashtra**(AIR 1984 SC 1622) to (**Manjunath C. Madalli** v. **State of Karnataka**(2007 AIR SCW 3196). We do not propose to reproduce herein the tests which are required to be met before an accused is held guilty in a case based on circumstantial evidence. In a case based on circumstantial evidence, all the circumstances sought to be proved must be proved beyond reasonable doubt and after the same are proved they must inevitably and exclusively point out to the guilt of the accused and there should not be any circumstance which may reasonably be considered consistent with the innocence of the accused and the Court is required to see

the cumulative effect of all the circumstances proved in a given case. The circumstances proved must also be such that they cannot be explained by any other hypothesis except the guilt of the accused and they should be of incriminating character.

16. There is no doubt that it is for the prosecution to prove its case beyond reasonable doubt against the accused. There is also no doubt that the accused are entitled to maintain profound silence in the course of a trial but not when there is a duty to speak and that takes us to Section 106 of the Indian Evidence Act which reads as follows:-

> Section 106 – Burden of proving fact specially within knowledge and when in fact is specially within the knowledge of any person, the burden of proving that fact is upon him.

17. Once the dead body of the deceased was found in the office of A-1/Ramanand whose brother-in-law is A-2/Rajesh and once the prosecution had proved that both were involved in the said death it was their duty to have explained the circumstances in which the deceased came to die in the office of A-1/Ramanand where A-2/Rajesh was also present and since they have failed to do so an adverse inference has got to be drawn against them. In other words, in a situation like this, where both the accused were found shrouded in suspicion and enmeshed in an incriminating network of facts, it was their duty to explain

the circumstances yielding to an adverse inference being drawn against them and since they omitted to do so, and failed in creating a dent in the prosecution case, their omission assumes sinister significance. It is well said that the dead tell no tales and the accused who are living had to explain the injuries upon the deceased as well as on A-2/Rajesh as to how they were caused to them. As far as A-1/Ramanand is concerned, he has chosen to remain totally silent and although both had admitted the injury on the hand of A-2/Rajesh, the explanation given by the latter has been proved to be false, by the prosecution. In the case of **Mr. Duggan Adrian Kevin** v. **State of Goa**(Criminal Appeal No.55 of 2005 decided on 18-7-2006)(to which one of us, Britto, J was a party), reference was made to a Division Bench Judgment of Madras High Court in the case of **Rajammal and others** v. **State**(1993 Cri. L. J. 3029) wherein reference was made to the decision of the Apex Court in the case of **Shambhu Nath Mehra** v. **State of Ajmer**(AIR 1956 SC 404) and observed that Section 101 of the Evidence Act lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible or at any rate disproportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that it means facts that are pre-eminently or exceptionally within his knowledge.

18. The Division Bench was considering a case of a dowry death where the victim had died due to manual strangulation and her in laws and husband's brother were alone present in the house at the time of the death and the Division Bench came to the conclusion that the only conclusion which was possible to be drawn on the facts of that case was that they had participated in the crime. The same conclusion can be drawn in this case as well, namely that both the accused participated in the crime.

19. The case of **Balram Prasad Agarwal** v. **State of Bihar**(1997(1) Crimes(SC) 10) was also referred to wherein the Supreme Court had dealt with the scope of Section 106 of the Indian Evidence Act and held that in a criminal case, the burden of proof is on the prosecution to prove the case beyond reasonable doubt. That was a case when on the fateful night, apart from the victim, only the accused were present in the house. The Court observed that what happened on that night and what led to the deceased falling in the well would be wholly within the personal and special knowledge of the accused but they had kept mum on this aspect. The Court further observed that the facts which were in the personal knowledge of the accused who were present in the house on that fateful night could have been revealed by them to disprove the prosecution case and this burden of Section 106 of the Indian Evidence Act was not discharged by them. As already noted prosecution has abundantly proved the involvement of both the accused in the death of the deceased in the very Office of A-1/Ramanand whose brother-in-law is A-2/Rajesh and in the absence of any plausible explanation from either of them as to how the said death came

about, the only irresistible inference that can be drawn is that the injury on the deceased was inflicted by both of them. In other words, they were the authors of the death of the deceased.

20. It has been submitted by Mr. S. G. Bhobe, the learned Counsel on behalf of A-2/Rajesh that A-2/Rajesh was found with a defensive injury on his right hand in an attempt to ward off the attack by the deceased and thereafter was neither in a position to inflict the injury on the deceased nor assist his brother-in-law A-1/Ramanand to inflict the injury on the deceased. In our view this is mere speculation, in the absence of any explanation from A-2/Rajesh. In the absence of any plausible explanation from either of the accused as to how the injury on the deceased came to be inflicted at the back of his person the only irresistible conclusion is that the same was inflicted by them in furtherance of common intention.

21. As far as the common intention is concerned, the Apex Court in **Suresh and another** v. **State of U.P.**((2001) 3 SCC 673), inter alia, has stated that what is required under the law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however has to be arrived at only when the Court can with judicial servitude, hold that the accused may have preconceived the

result that ensued in furtherance of common intention. In **Rotash** v. **State of Rajasthan**(2007 AIR SCW 44) the Apex Court has again stated that there is no uniform inflexible rule for applying the principle of common intention. The inference, therefore, must be drawn from the totality of the facts and circumstances of each case. It is difficult to find out two similar cases and whether the accused formed a common intention or not is essentially a question of fact. As far as this case goes, we have already observed that it would not have been possible for A-1/Ramanand alone to have inflicted the fatal injury upon the deceased if there was no concert at all on the part of A-2/Rajesh. It was the duty of the accused to have explained as to how the fatal injury was caused to the deceased when both of them were present and participated in the scuffle and in the absence of such explanation the only inference could be drawn is that the said injury was inflicted with the common intention of both.

22. Another submission made by Mr. P. P. Singh, the learned Counsel on behalf of A-1/Ramanand is that prosecution has failed to prove the motive which was essential in a case based on circumstantial evidence. We are not inclined to accept the said submission. In a case of this nature where the dead body of the deceased was found in the very office of A-1/Ramanand and a knife, with blood stains on the table of the said office, it was entirely for A-1/Ramanand to have explained as to how death was caused. No doubt, it is often said that motive bears a special significance in a case which involves circumstantial evidence but what it really does is that if it is proved, it makes the case stronger but its absence does not mean that the case is weak inasmuch as absence of

proof of motive does not render the evidence unworthy of being accepted. In fact, proof of motive is of no consequence when the evidence is strong and when circumstances speak loudly, boldly and clearly as in the case at hand, as observed by the Division Bench in the case of **Mr. Duggan Adrian Kevin** v. **State of Goa**(supra). In a situation like ours, the Apex Court in the case of **Ramkrushna** v. **State of Maharashtra**(2007 AIR SCW 3134) observed that once the "presence of the appellant with Balram was established, motive takes a back seat. Not that motive in this case has not been proved by the prosecution. The admission by A-1/Ramanand to PSI Prabhudessai/PW1 shows that death followed the arguments over money matters. Likewise, the admission of A-2/Rajesh to PW13/Dr. Benaulikar that there was a quarrel over the issue of money transaction sufficiently corroborates the admission of A-1/Ramanand that death followed arguments over money matters. This aspect is also sufficiently proved by the evidence of the widow of the deceased PW11/Kavita and the brother of the deceased PW14/Ram Babu Soni.

23. The next submission of Mr. P. P. Singh, the learned Counsel on behalf of A-1/Ramanand is that the death of the deceased, if at all was caused by A-1/Ramanand it was caused in self defence and such a possibility could not be ruled out. Mr. P. P. Singh has further stated that it is not the case of the prosecution that the deceased was murdered after A-1/Ramanand went to his house and on the contrary the death of the deceased was caused in his office when the deceased came to attack him. It is further submitted by Mr. P. P. Singh that the knife did not belong to A-1/Ramanand but it had belonged to the

deceased. Mr. Singh has placed reliance on **Naveen Chandra** v. **State of Uttraranchal**(2007(1) Crimes 207) and **Shivanna and others** v. **State of Karnataka**(2007(1) Crimes 91) wherein the Apex Court has held that in order to find out whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to recourse to public authorities are all relevant factors to be considered. It is further held that whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case, the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. The burden of proof is on the accused, who sets up the plea of self defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined by the prosecution. An accused taking the plea of the right of self defence is not necessarily required to call evidence. He can establish his plea with reference to circumstances

transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence and not a question of the accused discharging any burden. Where a right of private defence is pleaded, the defence must be reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

24. The right of private defence is essentially a defensive right circumscribed by the Indian Penal Code, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of retribution, expected to repel unlawful aggression and not as retaliatory measure.

25. We have already stated that the accused has given no explanation whatsoever as to how the deceased came to die with a stab injury with the knife which was on the table in his own office. We are unable to extend to A-1/Ramanand the benefit that he assaulted the deceased with the said knife and caused his death in self defence particularly because we find from the statement made by A-2/Rajesh to PW13/Dr. Banaulikar, whilst explaining the

injuries on his hand that he had already removed the knife from the deceased and thrown it aside and thereafter A-1/Ramanand took that knife and stabbed the deceased at his back which resulted in his death.

26. Nevertheless, we cannot be unmindful of the fact that the prosecution itself had come with a story that the deceased was stabbed at his back with a knife due to sudden quarrel on account of money transaction. This statement is seen from the FIR as well and that is the story which the Investigation Officer probably believed on the basis of the statement made to him by PW6/Manoj who thereafter did not adhere to the said statement. The injury on A-2/Rajesh would also support the plea that there was a sudden fight initially between the deceased and A-2/Rajesh when the latter tried to remove the knife from the hands of the deceased. The said injury has been described as defensive and probably there could be no other explanation to the same. Although, the learned Public Prosecutor has strenuously argued that the case is covered by Clause thirdly to Section 300 we are inclined to hold that the case is covered by Exception 4 to Section 300 I.P.C.

27. In the case **Sridhar Bhuyan** v. **State of Orissa** (AIR 2004 SC 4100) the Apex Court observed that in order to bring a case within Exception 4 to Section 300 I.P.C., it has to be established that the act was committed without premeditation, in a sudden fight, in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner. It was a case where the Apex Court

found that a fight had taken place for which more or less both the parties were to be blamed and although one of them had started it, but if the other had not aggravated it by his own conduct it would not have taken a serious turn and since it was difficult to apportion the share of blame, the Apex Court scaled down the conviction from Section 302 I.P.C. to Section 304(I) I.P.C. and reduced the sentence from life to 10 years. In the case of **Murli alias Denny** v. **State of Rajasthan**(1995 Supp.(1) SCC 39) the deceased, an anti-social man, went to the accused and abused him virulently and the accused got enraged and inflicted some stab injuries to the deceased with a knife and himself reported the matter to the Police. Most of the injuries were found on the hips and the Apex Court did not rule out the possibility of the deceased receiving those injuries during grappling and therefore gave the benefit of Exception 1 to Section 300 to the accused and convicted him under Section 304(i) for 10 years. In this case, the Apex Court took into account an admission of the accused to examine whether the case fell under Exception 1 to Section 300 I.P.C.

28. We may also refer to a decision of the Apex Court in the case of **Yogendra Morarji**(AIR 1980 SC 660) on which reliance was placed in the case of **Mr. Duggan Adrian Kevin**(supra) wherein the Supreme Court had held that notwithstanding the failure of the accused to establish positively the existence of circumstances which would bring his case within an exception, the circumstances proved by him may raise a reasonable doubt with regard to one or more of the necessary ingredients of the offence itself with which the accused stands charged. Thus, there may be cases where, despite failure of the accused

to discharge his burden under Section 105, the material brought on record may, in the totality of the facts and circumstances of the case, be enough to induce in the mind of the Court a reasonable doubt with regard to the mens rea under Section 299 contained in the Penal Code.

29. No two cases can be similar on facts either for the purpose of conviction or for imposing sentence. Considering the facts of this case, where the prosecution itself had come out with a case that the incident had taken place due to sudden quarrel and which appears to be so from the injuries found on the hand of A-2/Rajesh, in our view it would be a fit case to scale down the conviction from Section 302 I.P.C. to Section 304(i) r/w 34 I.P.C. and impose a sentence of 10 years R.I., the fine imposed by the learned Additional Sessions Judge, remaining unaltered.

30. We therefore allow the appeal partly on the above terms.

S. A. BOBDE, J.

N. A. BRITTO, J.

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